Supreme Court, U.S.
FILED
MAR 12 1996
CLERK

No. 95-1258

In the

Supreme Court of the United States

October Term, 1996

JEREMIAH W. (JAY) NIXON, ATTORNEY GENERAL OF MISSOURI, AND JOHN MAUPIN, CHAIRMAN, MISSOURI ETHICS COMMISSION,

Petitioners,

v.

THOMAS D. CARVER,

Respondent.

On Petition For Writ of Certiorari To the United States Court of Appeals For the Eighth Circuit

BRIEF OF THE STATES OF KENTUCKY, CONNECTICUT, FLORIDA, MINNESOTA, MONTANA, NEW MEXICO, OREGON, TENNESSEE, WEST VIRGINIA, THE CITY OF SAN DIEGO, CALIFORNIA AND THE DISTRICT OF COLUMBIA AS AMICI CURIAE IN SUPPORT OF PETITIONERS

A. B. CHANDLER, III
Attorney General of Kentucky

*PAMELA J. MURPHY
MORGAN G. RANSDELL
Assistant Attorneys General
P.O. Box 2000
Frankfort, KY 40602-2000
(502) 564-7600

Of Counsel:

SHERYL G. SNYDER
JACQUELYN P. ELMORE
BROWN, TODD & HEYBURN, PLLC
3200 Providian Center
Louisville, KY 40202
(502) 589-5400

* *Counsel of Record for Amici*

additional counsel listed on inside cover

37 pp

RICHARD BLUMENTHAL
Attorney General of Connecticut
55 Elm Street
Hartford, CT 06106
(860) 566-7279

ROBERT A. BUTTERWORTH
Attorney General of Florida
The Capitol, Suite PL-01
Tallahassee, FL 32399-1050
(904) 488-9935

HUBERT H. HUMPHREY III
Attorney General of Minnesota
102 State Capitol
St. Paul, MN 55155
(612)282-5700

JOSEPH P. MAZUREK
Attorney General
State of Montana
Justice Building
P.O. Box 201401
Helena, MT 59620-1401
(406) 444-2026

TOM UDALL
Attorney General
State of New Mexico
P.O. Drawer 1508
Santa Fe, New Mexico 87504
(505) 827-6000

THEODORE R. KULONGOSKI
Attorney General of Oregon
100 Justice Building
Salem, Oregon 97310
(503) 378-4402

CHARLES W. BURSON
Attorney General & Reporter
State of Tennessee
500 Charlotte Avenue
Nashville, Tennessee 37243
(615) 741-3491

DARRELL V. MCGRAW JR.
Attorney General of
West Virginia
State Capitol, Rm 26
East Wing
Charleston, WV 25305-0220
(304) 558-2021

JOHN W. WITT
City Attorney
The City of San Diego,
California
City Administration Building
202 "C" Street, 3d Floor
San Diego, CA 92101-3863
(619) 236-6220

CHARLES F. C. RUFF
Corporation Counsel for the
District of Columbia
441 Fourth Street, N.W.
Washington, D.C. 20001
(202) 727-6252

TABLE OF CONTENTS

Page

INTEREST OF THE AMICI CURIAE 2

SUMMARY OF ARGUMENT 4

ARGUMENT 6

I. The Court Should Reaffirm That Contribution Limitations Only Infringe Speech Indirectly and Therefore Are Not Subject to Strict Scrutiny 8

II. This Court Should Reaffirm that the Governmental Interests Sufficient to Warrant Contribution Limits Include Protecting Public Confidence in the Integrity of the Electoral Process 14

III. The Court Should Furnish Criteria for Determining the Level at Which Contribution Limitations are too Low to be Sufficiently Narrowly Tailored . . 17

CONCLUSION 21

TABLE OF AUTHORITIES

Page

CASES:

Buckley v. Valeo . . . . . passim

California Medical Association v. F.E.C. 9, 10

Carver v. Nixon, 72 F.3d 633, 644 (8th Cir. 1995) 5, 10, 15

F.E.C. v. Massachusetts Citizens For Life 10, 14

F.E.C. v. National Conservative Political Action Committee 10

Gable, et al. v. Jones, et al., Civil Action No. 95-12, (E.D. Ky.) 3

Galbraith, et al. v. Gorman, et al., Civil Action No. 94-CI-1731, (Franklin Circuit Court, February 6, 1995) 3

Kentucky Right to Life, et al. v. Nicholas King, et al., Case No. 3:95CV-582-H (W.D.Ky. 1995) 3, 5, 13, 19

Wilkinson v. Jones, 876 F. Supp. 916, 929 (W.D.Ky. 1995) 3

OTHER MATERIALS:

CAMPAIGN FINANCE UPDATE: LEGISLATION AND LITIGATION IN THE 50 STATES, THE DISTRICT OF COLUMBIA AND THE FEDERAL GOVERNMENT, Counsel of Governmental Ethics Laws (1995) 2

Miller, KENTUCKY POLITICS AND GOVERNMENT, 197-215 (Univ. Nebraska Press 1994) 3

No. 95-1258

In the

Supreme Court of the United States

October Term, 1996

JEREMIAH W. (JAY) NIXON, ATTORNEY GENERAL OF MISSOURI, AND JOHN MAUPIN, CHAIRMAN, MISSOURI ETHICS COMMISSION,

Petitioners,

v.

THOMAS D. CARVER,

Respondent.

On Petition For Writ of Certiorari
To the United States Court of Appeals
For the Eighth Circuit

BRIEF OF THE STATES OF KENTUCKY, CONNECTICUT, FLORIDA, MINNESOTA, NEW MEXICO, OREGON, TENNESSEE, WEST VIRGINIA, THE CITY OF SAN DIEGO, CALIFORNIA, AND THE DISTRICT OF COLUMBIA AS AMICI CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF THE AMICI CURIAE

By approving limitations on the size of campaign contributions to candidates for public office, *Buckley v. Valeo*[1] provided an essential means of combating the appearance and reality of political corruption, and restoring voter confidence in the political process. A majority of the States and many local governments have now embraced contribution limits as an integral part of a legislative framework designed to decrease the corrosive influence of money on the process of electing public officials.[2]

In Kentucky, for example, the legislative framework regulating campaign finance was enacted in the

---

[1]424 U.S. 1 (1976).

[2]Eighteen cities and states have adopted contribution limitations lower than the $1,000 per election ($2,000 per election cycle) expressly approved in *Buckley*. See, Appendix A, *infra*. Under the Eighth Circuit's requirement that the $1,000 limitation approved in *Buckley* must be discounted for 22 years' inflation, the Eighth Circuit opinion also jeopardizes the contribution limitations in the 25 cities and states who have limitations of $1,000 per election or $2,000 per election cycle. See, Appendix B, *infra*.. Indeed, discounting the $1,000 contribution limitation to 1974 dollars jeopardizes several state and local limitations which do not greatly exceed $1,000 per election. See, Appendix C, *infra*. Finally, the trend is for states and cities to adopt smaller contribution limitations to remedy the public's perception that money speaks louder than ideas in American politics. See, CAMPAIGN FINANCE UPDATE: LEGISLATION AND LITIGATION IN THE 50 STATES, THE DISTRICT OF COLUMBIA AND THE FEDERAL GOVERNMENT, Counsel of Governmental Ethics Laws (1995). Accordingly, the Eighth Circuit opinion affects those states whose current contribution limitations may not be jeopardized, but whose power to enact further remedial legislation is jeopardized by that decision. *See*, Appendix D., *infra*.

wake of an FBI sting operation in which public officials had been sentenced to prison for selling their influence for far less than $1,000 -- the culmination of an era in which money has greatly influenced Kentucky politics.[3]

As occurred with Missouri's campaign finance reforms, Kentucky's reforms immediately produced litigation. Indeed Kentucky's campaign finance reform legislation faced no less than four constitutional challenges.[4]

---

[3]Miller, KENTUCKY POLITICS AND GOVERNMENT, 197-215 (Univ. Nebraska Press 1994). The Kentucky legislation limits to $500 the amount which an individual or a registered committee may contribute to a candidate in an election, which is $1,000 for the primary and general election cycle. KRS 121.150(6). Kentucky also enacted a system of public financing for its gubernatorial elections. KRS 121S.020 et. seq.

[4]In *Kentucky Right to Life, et al. v. Nicholas King, et al.*, Case No. 3:95CV-582-H (W.D. KY. 1995) (unpublished opinion), appeal pending, No. 95-6581 (6th Cir.), the District Court upheld Kentucky's $500 limit as narrowly tailored to the Commonwealth's compelling interests in preventing corruption and its appearance. In its brief to the Sixth Circuit, appellant Kentucky Right to Life relies heavily upon the Eighth Circuit's opinion in this case. In *Gable, et al. v. Jones, et al.*, Civil Action No. 95-12, (E.D.Ky.) (unpublished partial opinion) the court upheld most of Kentucky's reforms, including the requirement that privately financed candidates make contributions of their own resources at least 30 days prior to the election in order to preserve the efficacy of publicly financed candidates' correlative release from the voluntary spending limit. In *Wilkinson v. Jones*, 876 F. Supp. 916, 929 (W.D.Ky. 1995), the court also upheld most of the challenged provisions, including the $50,000 limitation on loans by candidates to their campaign committees. In *Galbraith, et al. v. Gorman, et al.*, Civil Action No. 94-CI-1731, (Franklin Circuit Court, February 6, 1995), the court invalidated Kentucky's $100 limit on contributions to privately financed gubernatorial candidates as violative of the Equal Protection clause because publicly financed candidates were permitted to accept

Other states and cities enacting similar reform legislation will likely face similar litigation, especially if the Eighth Circuit's misinterpretation of *Buckley* is allowed to stand. If certiorari is not granted by this Court, the Eighth Circuit opinion will create uncertainty for any State legislature or city council considering reduced contribution limits as a remedy to the perception that special interest money controls American politics. It would also greatly assist the courts in determining the constitutionality of reduced contribution limitations if this Court granted certiorari in this case to resolve these issues.

SUMMARY OF ARGUMENT

The Eighth Circuit's decision threatens the contribution limits chosen by several State and local governments and, therefore, threatens to destroy their carefully calibrated legislative remedies designed to combat political corruption in their elections and to restore their electorates' confidence in those elections.[5]

The Eighth Circuit's insistence that *Buckley* permits limits only on "large" contributions ignores the distinctions between nationwide, statewide and local elections, and ignores the efforts made by states such as Missouri to tailor their limits to the relative size of the relevant constituency. The Eighth Circuit's analysis also ignores the reality that local legislators are better situated to determine the *quid pro quo* threshold in their communities

---

contributions in amounts up to $500.

[5] *See* footnote 2, *supra*.

than the federal courts, and threatens the ability of State and local governments to tailor the contribution limits to that threshold.[6]

In *Buckley*, this Court recognized that limitations on contributions only infringe speech indirectly because contributors may make unlimited independent expenditures. The Court therefore held that courts should defer to legislative decisionmaking in choosing from among various alternative contribution limitations.[7] The Eighth Circuit opinion nevertheless requires a legislature to justify its chosen limitation.[8] Consequently, the Eighth Circuit opinion sows confusion on these issues for both legislators and judges.

The Eighth Circuit's reliance on a mathematical comparison to the contribution limit upheld in *Buckley*,

---

[6]For example, deference to the legislative choice of the Kentucky General Assembly in imposing a $500 contribution limit is particularly appropriate in light of the paltry sums of money that have wielded a corrupt influence in Kentucky politics in recent years--a political climate which recently culminated in the sentencing of a number of elected public officials to prison for selling their votes for amounts as low as $400. As Judge Heyburn noted in *Kentucky Right to Life, et al. v. Nicholas King, et al.*, Case No. 3:95CV-582-H, at 9 (W.D. KY.. 1992), appeal pending, No. 95-6581 (6th Cir.): "No one with a working knowledge of our recent political history can doubt that some limitation on contributions will contribute directly to reducing the perception of political corruption in Kentucky. ... Who should know better than the legislature what might wash the appearance of corruption from our politics?"

[7]424 U.S. at 30.

[8]*Carver v. Nixon*, 72 F.3d 633, 644 (8th Cir. 1995).

discounted for inflation, is also contrary to this Court's decision in *Buckley*. There is not yet a conflict in circuits in this precise point, because the Eighth Circuit's purely mathematical approach is unprecedented. However, there is a conflict in circuits on the controlling analytical framework, with the Eighth Circuit interpreting *Buckley* to require strict scrutiny and other circuits interpreting *Buckley* to apply a less rigorous standard to contribution limitations.[9]

The Eighth Circuit's decision will open the floodgates to litigation as campaign finance reforms are enacted in many States, cities and other local governments. This Court should therefore avail itself of the opportunity presented by this case to clearly state the level at which limits on contributions to candidates become unconstitutional, and by what criteria that level is to be determined.

ARGUMENT

While *Buckley* inarguably sanctioned the imposition of limitations on contributions made directly to candidates by upholding the $1,000 limit at issue in that case, the *Buckley* decision did not provide a definitive means of evaluating contribution limits below that amount. In rejecting the argument that the $1,000 limit was too low, *Buckley* stated that:

> While the contribution limitation provisions might well have been structured to take

---

[9] *See*, footnotes 19 and 21, *infra*, and accompanying text.

> account of the graduated expenditure limitations for House, Senate and Presidential campaigns, Congress' failure to engage in such fine tuning does not invalidate the legislation. As the Court of Appeals observed, "[i]f it is satisfied that some limit on contributions is necessary, a court has no scalpel to probe, whether, say, a $2,000 ceiling might not serve as well as $1,000." ... Such distinctions in degree become significant only when they can be said to amount to differences in kind.[10]

Subsequently, lower courts have struggled to define when a difference in degree becomes a difference in kind. In that quest, those courts must also discern from *Buckley* and its progeny the degree to which contribution limitations infringe upon freedom of speech, not just freedom of association; whether the infringement must withstand strict scrutiny or less rigorous analysis; the precise nature of the compelling state interest sufficient to withstand that scrutiny; and at what level the contribution limitation is sufficiently narrowly tailored in advancing that interest. The Eighth Circuit opinion illustrates the difficulty lower courts have had with these issues since *Buckley*. By granting certiorari in this case, the Court can give guidance on all these issues.

---

[10] *Buckley*, 424 U.S. at 30.

I. The Court Should Reaffirm That Contribution Limitations Only Infringe Speech Indirectly and Therefore Are Not Subject to Strict Scrutiny.

Buckley discussed the impact of contribution limits upon the first amendment rights of contributors primarily in terms of freedom of association. Because a contributor retains the right to make unlimited independent expenditures, *Buckley* held that "a limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor's ability to engage in free communication."[11] *Buckley* explained that "[t]he quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing."[12] Accordingly, *Buckley* held that "the primary First Amendment problem raised by the Act's contribution limitations is their restriction of one aspect of the contributor's freedom of political association."[13]

Perhaps because *Buckley* analyzed contribution limits as minimally impacting speech, *Buckley* implied that contribution limits were subject to something less than

---

[11] *Id.* at 20.

[12] *Id.* at 21.

[13] *Id.* at 24.

strict scrutiny, without explicitly defining the level of scrutiny used in sustaining the contribution limits.[14]

In *Buckley,* this Court explained that "[w]hile contributions may **result** in political expression if spent by a candidate or an association to present views to the voters, the transformation of contributions into political debate **involves speech by someone other than the contributor**."[15] *Buckley*, therefore found that:

> A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but

---

[14]*See, e.g., Buckley,* at 25, "governmental 'action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny'" *id.* at 29, "We find that, under the rigorous standard of review established by our prior decisions, the weighty interests served by restricting the size of financial contributions to political candidates are sufficient to justify the limited effect upon First Amendment freedoms caused by the $1,000 contribution ceiling" and; *id.* at 44-45, "The discussion ..., *supra,* explains why the Act's expenditure limitations impose far greater restraints on the freedom of speech and association than do its contribution limitations. The markedly greater burden on basic freedoms caused by §608(e) (1) [limiting independent expenditures] thus cannot be sustained simply by invoking the interest in maximizing the effectiveness of the less intrusive contribution limitations. Rather, the constitutionality of §608(e) (1) turns on whether the governmental interests advanced in its support satisfy the exacting scrutiny applicable to limitations on core First Amendment rights of political expression."

[15]*Buckley*, 424 U.S. at 21 (emphasis supplied). *Accord, California Medical Association*, 453 U.S. 182, 197 (1981).

does not in any way infringe the contributor's freedom to discuss candidates and issues.[16]

In *California Medical Association v. F.E.C.*,[17] a plurality of this Court interpreted *Buckley* to mean that contributions were not "entitled to full First Amendment protection" and described contributions as "speech by proxy."[18] Similarly, this Court, in *F.E.C. v. National Conservative Political Action Committee*, distinguished between the speech by proxy of contributors and the independent expenditures of PACs, finding the latter entitled to full first amendment protection.[19] Accordingly, in *F.E.C. v. Massachusetts Citizens For Life*, this Court stated that it had "consistently held that restrictions on contributions require less compelling justification than restrictions on independent spending."[20]

Despite this Court's square holdings, the Eighth Circuit held "we apply strict scrutiny in this case..."[21] In

---

[16]*Buckley*, 424 U.S. at 21 (emphasis supplied).

[17]453 U.S. 182 (1981).

[18]*Id.* at 196.

[19]470 U.S. 480, 494-495 (1985).

[20]479 U.S. 238, 259-260 (1986).

[21]*Carver v. Nixon*, 72 F.3d 633, 638 (8th Cir. 1995).

so holding, the Eighth Circuit created a clear split among the circuits' interpretations of *Buckley*.[22]

The Eighth Circuit acknowledged that *Buckley* articulated a standard less than strict scrutiny applicable to contribution limitations. However, the Eighth Circuit noted that *Buckley* also articulated a "compelling state interest" in upholding contribution limitations. The Eighth Circuit therefore concluded: "When the Court in *Buckley* analyzed the contribution limits, it articulated and applied

---

[22]*See, Service Employees International Union v. Fair Political Practices Commission*, 955 F.2d 1312, 1322 (9th Cir. 1992) ("The Supreme Court has applied a somewhat less stringent test than strict scrutiny to decide the constitutionality of contribution limitations. However, the test is still a 'rigorous' one. ... Proposition 73's ban on inter-candidate transfers may be sustained, therefore, only if the state 'demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms'." *quoting Buckley*, 424 U.S. at 25), (citations omitted). *See also, Let's Help Florida v. McCrary*, 621 F.2d 195 (5th Cir. 1980). In determining the constitutionality of a $1,000 limit on contributions to committees organized to promote or defeat referenda issues, the Fifth Circuit interpreted *Buckley* to mean that "[e]ven though contributions receive less first amendment protection than do direct expenditures, a state may restrict political contributions only if the state 'demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms.'" *Id.* at 199, *quoting Buckley*, 424 U.S. at 25. The Fifth Circuit implicitly accepted the interest of the state in promoting disclosure of the proposal's financial support as a sufficiently important interest, but found that the statute was not closely drawn to avoid unnecessary abridgment of associational freedoms.

a strict scrutiny standard of review."[23] The Eighth Circuit's explication was:

> In view of these fundamental interests, the Court has instructed that campaign contribution limits are "subject to the closest scrutiny." Under this standard, "a significant interference with protected rights of political association may be sustained" only when the State can demonstrate "a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgement of associational freedoms." ...
>
> The State argues that the Court in *Buckley* applied strict scrutiny only to legislation limiting independent expenditures and applied a lower, intermediate standard of review to contribution limits. ...
>
> We recognize that the Court distinguished restrictions on independent expenditures from restrictions on contributions. Since *Buckley*, members of the Court, in dicta, have indicated that contribution limits should receive a lower level of scrutiny. In contrast, other members of the Court strongly disagree, arguing that nothing less than strict scrutiny should apply to contribution limits. The Court has not ruled that anything other than strict scrutiny

---

[23]72 F.3d at 637.

> applies in cases involving contribution limits. When the Court in *Buckley* analyzed the contribution limits, it articulated and applied a strict scrutiny standard of review. ...
>
> Thus, we apply strict scrutiny in this case, and the State must show that the Proposition A limits are narrowly tailored to meet a compelling state interest.[24]

Some federal district courts have agreed with the Eighth Circuit's interpretation of *Buckley*, and have applied the strict scrutiny standard to contribution limitations as well as to expenditure limitations[25]. The First and Ninth Circuits, and some state and other federal

---

[24]72 F.3d at 636-638 (citations omitted).

[25]*See, e.g., Vannatta v. Keisling*, 899 F. Supp. 488, 496 (Oregon 1995) (in challenge to contribution limits on out-of-district contributors, court rejected appellants' contention that *Buckley* applied less than strict scrutiny to contribution limits and held that *Buckley* "sustained the contribution limits because they were supported by a compelling state interest in preventing 'improper influence,' but . . . invalidated the expenditure restrictions because they failed to serve any substantial governmental interest."); *Kentucky Right to Life, et al. v. Nicholas King, et al.*, Case No. 3:95CV-582-H, n.9, (W.D.Ky. 1995) (unpublished opinion). *See also, Service Employees International Union v. Fair Political Practices Commission*, 747 F. Supp. 580, 589 n.20 (E.D. Cal. 1990) *aff'd* 955 F.2d 1312 (9th Cir. 1992) (recognizing the distinction but finding that "as best [this court] the 'speech by proxy' notion has never commanded a majority of the Court, and it appears to be inconsistent with the evolving First Amendment doctrine").

courts, however, hold *Buckley* applies less than strict scrutiny to contribution limits.[26]

The Court should grant the writ in this case to eliminate the confusion among the courts whether contribution limitations are subjected to strict scrutiny or "less compelling justification."[27] If this Court were to determine that the Eighth Circuit's application of strict scrutiny was proper, the Court would then need to clarify the confusion surrounding the nature of the compelling state interest necessary to withstand such strict scrutiny.

---

[26]*See*, footnote 17, *supra*. *See also*, *Opinion of the Justices to the House of Representatives*, 637 N.E.2d 213 (Mass. 1994). In determining that aggregate limits on the total amount of contributions candidates could accept would be tantamount to restricting the candidates' expenditures, the Supreme Judicial Court held that "[b]ecause [*Buckley*] treated freedom of association as subject to greater abridgment than freedom of speech, [*Buckley*] generally upheld ... contribution limitations ... but it rejected ... expenditure limitations as unconstitutional" and that "the restrictions on freedom of association imposed by contribution limitations are subject to a less strict standard than are the burdens placed on speech by the expenditure limitations." *Id*. at 215-216. In *Zeller v. The Florida Bar*, 909 F. Supp. 1518 (N.D. Fla. 1995), the court recognized a distinction between the level of scrutiny applicable to contribution limits and expenditure limits, but it found the distinction inapplicable in that case because the contribution restriction there, a complete prohibition on contributions to candidates earlier than one year prior to the election, also had the effect of limiting the expenditures of the candidates during that period.

[27]*F.E.C. v. Massachusetts Citizens for Life*, 479 U.S. at 259-60.

II. This Court Should Reaffirm that the Governmental Interests Sufficient to Warrant Contribution Limits Include Protecting Public Confidence in the Integrity of the Electoral Process.

The Eighth Circuit found that the only compelling interest identified in this Court's decision in *Buckley* is "the prevention of corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions"[28] The Eighth Circuit therefore found that a State or local government has a compelling interest only in preventing large campaign contributions:

> The district court held that "[u]nder *Buckley*, Missouri clearly has a compelling state interest in limiting campaign contributions." *Carver*, 882 F. Supp. at 904. This does not square with the interest of limiting "large campaign contributions" as defined in *Buckley*. The District court's decision substantially broadens the compelling interest identified in *Buckley*. The district court erred as a matter of law in extending *Buckley* to the infinitely broader interest of limiting all, not just large, campaign contributions.[29]

---

[28] *Carver v. Nixon*, 72 F.3d at 638, *quoting Buckley*, 424 U.S. at 25 (emphasis supplied by the Eighth Circuit).

[29] *Id.* at 639.

By focusing on *Buckley*'s observation that large campaign contributions particularly lend themselves the appearance of corruption, the Eighth Circuit misidentified the compelling governmental interest as "limiting large campaign contributions" rather than preventing corruption and its appearance. That holding is clearly contrary to *Buckley*.

In *Citizens Against Rent Control v. City of Berkley*, the Court did say:

> *Buckley* identified a single narrow exception to the rule that limits on political activity were contrary to the First Amendment. The exception relates to the perception of undue influence of large contributors to a candidate[.][30]

However, in *F.E.C. v. National Right to Work Committee*, a unanimous Court held:

> ... in *Buckley v. Valeo* ... we specifically affirmed the importance of preventing both the actual corruption threatened by large financial contributions and the eroding of public confidence in the electoral process through the appearance of corruption. **These interests directly implicate "the integrity of our electoral process, and, not less, the responsibility of the individual citizen for the successful functioning of**

---

[30]454 US 290, 296 (1981).

> **that process."** ... [When the legislature has acted] to prevent both actual and apparent corruption, ... we accept Congress' judgment that it is the potential for such influence that demands regulation. Nor will we second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared.[31]

Thus, the Eighth Circuit is in error when it narrows the compelling interests to limiting "large" contributions because of their special tendency to create the perception of corruption. The States' and cities' interests in "the integrity of our electoral process" is equally compelling.

III. The Court Should Furnish Criteria for Determining the Level at Which Contribution Limitations are too Low to be Sufficiently Narrowly Tailored.

Consistent with *Buckley's* holding that contribution limits burden primarily the contributor's right to freely associate, not the contributor's freedom of speech,[32] any

---

[31]459 U.S. 197, 208-10 (1982), *quoting United States* v. *Automobile Workers*, 352 U.S. 567, 570 (1957).

[32]*See, e.g., Wachsman v. City of Dallas*, 704 F.2d 160, 173 (5th Cir. 1983) ("Limitations on campaign contributions unquestionably involve substantial first amendment rights. These rights are primarily associational, although they also affect freedom of expression, especially when the ban is absolute. In fact, since a total prohibition prevents the 'symbolic expression of support evidenced by a contribution,' [*Buckley, supra*] the City Charter [which prohibits contributions by city employees to some candidates] limits employees' freedom of expression in the

analysis of *Buckley's* reference to a "difference in kind" must focus on the associational burdens imposed by a particular contribution limitation. According to *Buckley*, the difference in kind would occur only if the limit were so low that "the limitations prevented candidates and political committees from amassing the resources necessary for effective advocacy," or "preclude[d] ... associations from effectively amplifying the voice of their adherents, the original basis for the recognition of First Amendment protection of the freedom of association."[33]

---

constitutionally sensitive area of political speech.") (citations omitted); *Federal Election Commission v. Weinsten*, 462 F. Supp. 243, 249 (S.D.N.Y. 1978) (interpreting *Buckley* as saying that Congress may not totally prohibit individual contributions).

[33]Buckley, 424 U.S. at 21, 22. For examples of cases adhering to such an analysis, *see State v. Dodd*, 561 So.2d 263, 266, (Fla. 1990) (in holding unconstitutional a ban on contributions while the legislature was in session, the court stated that while "*Buckley* found a less significant free speech interest when contributions were subject to a ceiling, because the 'quantity of communication ... does not increase perceptibly with the size of [the] contribution' ... the *Buckley* Court expressly distinguished its own factual situation from restrictions on contributions that effectively would prevent candidates 'from amassing the resources necessary for effective advocacy.'") (citation omitted); *Opinion of the Justices to the House of Representatives*, 637 N.E.2d 213 (Mass. 1994) (invalidating aggregate contribution limits because limits on the total amount of contributions candidates could accept was tantamount to restricting the candidates' expenditures); *Zeller v. The Florida Bar*, 909 F. Supp. 1518 (N.D. Fla. 1995) (holding a complete prohibition on contributions to candidates earlier than one year prior to the election unconstitutional because the restriction also had the effect of limiting the expenditures of the candidates during that period); *see also, Service Employees International Union v. Fair Political Practices Commission*, 955 F.2d 1312, 1322 (9th Cir. 1992) (finding unconstitutional a ban on a candidate's use of his campaign funds to contribute to other candidates because it operated as an expenditure limitation).

The Eighth Circuit completely failed to undertake this inquiry. Indeed, the Eighth Circuit invalidated Missouri's effort to calibrate its limitations to the size of the affected constituencies. Instead, the result reached by the Eighth Circuit makes the $1,000 approved in *Buckley* a benchmark which, when discounted for 22 years' inflation, forms a floor under which State and local governments cannot go. Nothing in *Buckley* supports that analysis.

The Eighth Circuit's simple mathematical comparison with the contribution limit upheld in *Buckley* is a flawed analysis. It ignores the relative size of constituencies in nationwide Presidential elections, as in *Buckley*, and in the statewide and local elections in this case.[34] The Eighth Circuit's approach further ignores the inherently smaller sum of aggregate contributions amassed in elections for less significant offices than the Presidency of the United States, the election at issue in *Buckley*.[35]

---

[34]As the United States District Court for the Western District of Kentucky recently stated in upholding Kentucky's $500 contribution limit: "Comparing this limitation to the $1,000 limitation approved in *Buckley*, as some courts have attempted, is unenlightening for a whole host of reasons. Among other things, the difference in the scope of the elections is so immense that comparisons are meaningless. Additionally, the *Buckley* Court did not propose $1,000 as the lower limit, only as an amount which passed constitutional muster." *Kentucky Right to Life, et al. v. Nicholas King, et al.*, Case No. 3:95CV-582-H, n.9 (W.D.Ky. 1995) (unpublished opinion), appeal pending, No. 95-6581 (6th Cir.).

[35]Even if a mathematical comparison would suffice to determine when contribution limits are "too low," the comparison of anticipated expenditures in state and local elections, in comparison to *Buckley's* national elections, is a more accurate measure of the narrow tailoring of those contribution limits than the flat-rate, inflation-indexed comparison offered by the Eighth Circuit. For example, in Kentucky gubernatorial

Moreover, the Eighth Circuit's rationale ignores the ability of local legislators and voters to accurately gauge the level at which contributions might be perceived in their community as having the potential to corrupt candidates.

Finally, the Eighth Circuit opinion imposes the burden upon the State or local government to prove why it selected a particular contribution limit lower than other available alternatives. 72 F.3d at 642-43.[36] That holding is contrary to the teachings of this Court. In *Buckley*, this Court squarely held that "[i]f it is satisfied that some limit on contributions is necessary, a court has no scalpel to probe, whether, say, a $2,000 ceiling might not serve a well as $1,000." 424 U.S. at 30. Similarly, in *F.E.C. v. National Right to Work Committee*, this Court said that it

---

elections, there is a voluntary $1.8 million expenditure limitation for publicly funded slates of candidates and a $500 limit on the amount an individual can contribute to each slate. The statutes approved in *Buckley* involved a $1,000 contribution limit in national campaigns limited to $20 million in expenditures. *See*, 424 U.S. at 54. Thus, *Buckley* approved limiting contributions by individuals to 1/20,000 of the total expenditures in a national campaign, and Kentucky limits contributions to 1/3600 of the aggregate expenditures in a statewide campaign. Thus, the Kentucky $500 limit is more than 500% larger than the $1,000 limit approved in *Buckley* when expressed as a percentage of the candidate's anticipated expenditures.

[36]The Eighth Circuit acknowledged the teaching of *Buckley* that "we certainly are not free to fine tune the limits established by Proposition A, and we generally accept the limits established by the legislature...." 72 F.3d at 641. The Eighth Circuit nevertheless held: "The State produced no evidence as to why the Proposition A limits of $100, $200, and $300 were selected. ... The record is barren of any evidence of a harm or disease that needed to be addressed between the limits of Senate Bill 650 and those enacted in Proposition A." *Id.* at 642-43.

would not "second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared."[37] By deviating from these precepts, the Eighth Circuit has created confusion concerning the criteria by which state and federal courts are to judge contribution limitations less than the $1,000 expressly approved in *Buckley*.

CONCLUSION

In sum, the Eighth Circuit's decision will inhibit the campaign finance reform movement by confusing state and local legislators and by encouraging litigation employing the Eighth Circuit's erroneous and ambiguous standards. By holding that only those limits which prohibit "large" contributions pass constitutional muster, the Eighth Circuit has obscured the proper criteria for determining whether any particular contribution limit is sufficiently narrowly tailored to survive the proper level of scrutiny.

There clearly is confusion among the lower courts, including an outright split in circuits concerning the level of scrutiny applicable to contribution limitations. The Eighth Circuit's opinion, if left unaddressed by this Court, will add much to that confusion, inhibiting the ability of the State and local governments to restore public confidence in the electoral process. The Court should not

---

[37]459 U.S. at 210.

wait for the confusion to worsen before granting certiorari on these issues, which go to the core of self-government.[38]

Respectfully submitted,

A. B. CHANDLER, III
Attorney General of Kentucky

* PAMELA J. MURPHY
MORGAN G. RANSDELL
Assistant Attorneys General
P.O. Box 2000
Frankfort, KY 40602-2000
(502) 564-7600

* *Counsel of Record for Amici*
March 7, 1996

Of Counsel:

SHERYL G. SNYDER
JACQUELYN P. ELMORE
BROWN, TODD & HEYBURN, PLLC
3200 Providian Center
Louisville, KY 40202
(502) 589-5400

RICHARD BLUMENTHAL
Attorney General of Connecticut
55 Elm Street
Hartford, CT 06106
(860) 566-7279

---

[38]The Court has already granted certiorari this Term in a campaign finance regulation case: *Colorado Republican Federal Campaign Committee v. F.E.C.*, No. 95-489. A significant issue in that case is Petitioners' contention the limitations imposed by 2 U.S.C. § 441a(d) are unconstitutionally low. Brief for Petitioners, at 27-28.

ROBERT A. BUTTERWORTH
Attorney General of Florida
The Capitol, Suite PL-01
Tallahassee, FL 32399-1050
(904) 488-9935

HUBERT H. HUMPHREY, III
Attorney General of Minnesota
102 State Capitol
St. Paul, MN 55155
(612)282-5700

JOSEPH P. MAZUREK
Attorney General
State of Montana
Justice Building
P.O. Box 201401
Helena, MT 59620-1401
(406) 444-2026

TOM UDALL
Attorney General
State of New Mexico
P.O. Drawer 1508
Santa Fe, New Mexico 87504
(505) 827-6000

THEODORE R. KULONGOSKI
Attorney General of Oregon
100 Justice Building
Salem, Oregon 97310
(503) 378-4402

CHARLES W. BURSON
Attorney General & Reporter
State of Tennessee
500 Charlotte Avenue
Nashville, Tennessee 37243
(615) 741-3491

DARRELL V. MCGRAW, JR.
Attorney General of
West Virginia
State Capitol, Rm. 26
East Wing
Charleston, WV 25305-0220
(304) 558-2021

JOHN W. WITT
City Attorney
The City of San Diego,
California
City Administration Building
202 C Street, 3d Floor
San Diego, CA 92101-3863
(619) 236-6220

CHARLES F. C. RUFF
Corporation Counsel for the
District of Columbia
441 Fourth Street, N.W.
Washington, D.C. 20001
(202) 727-6252

APPENDIX A

STATES AND CITIES WITH CONTRIBUTION LIMITS BELOW $1,000 PER ELECTION/$2,000 PER ELECTION CYCLE[1]

STATE / CITY NAME	CONTRIBUTION LIMIT
Arizona:	
Statewide	$690
Other Offices	$270
Connecticut:	
Probate Judge State Senate	$500
State Representative Other Local Offices	$250
Delaware:	
Non-Statewide Candidate	$600
District of Columbia:	
Mayor Council Chair Councilmember At-Large	$100
Councilmember From a District or Board of Education Member At-Large	$50
Board of Education Member From a District or Party Official Neighborhood Advisory Committee Member	$25

[1]Unless otherwise noted, contribution limits are per election.

STATE / CITY NAME	CONTRIBUTION LIMIT
Florida:	
All Offices	$500
Kansas:	
State House	$500
Local Office	
District Judge	
District Magistrate Judge	
District Attorney	
State School Board	
Kentucky:	
School Board	$100
All Other Candidates	$500
Massachusetts:	
All Candidates	$500[a]
Michigan:	
State Representative	$500[b]
Judicial Office	$100[bc]
Minnesota:	
Governor / Lt. Governor	$500[d]
Attorney General	$200[d]
Other Statewide Offices	$500[e] \ $100[d]
State Senate	
State Representative	

[a]Per Year
[b]Per Election Cycle
[c]Lawyers
[d]Non-Election Year
[e]Election Year

STATE / CITY NAME	CONTRIBUTION LIMIT
Missouri:	
Senate Candidates	$500
House Candidates	$250
Local Office Candidates	Various Limits
Montana:	
Governor / Lt. Governor	$400
Statewide Candidates	$200
All Other Candidates	$100
Oregon:	
Governor Secretary of State State Treasurer Superintendent of Public Instruction Attorney General Commissioner of the Bureau of Labor and Industries Judge of Supreme Court or Court of Appeals or Tax Court	$500
State Senator State Representative	$100
The City of San Diego, California:	
All Candidates	$250
Springfield, Missouri:	
All Candidates	$75 / $150[b]
South Dakota:	
Legislative County Office	$250[f]
Washington:	
State Legislative Office	$500

[b]Per Election Cycle
[f]Per Calender Year

STATE / CITY NAME	CONTRIBUTION LIMIT
Wisconsin:	
State Assembly Representative	$500[f]
Local Office	$250 x 1 cent x number of inhabitants ($3,000 maximum)

[f]Per Calendar Year

APPENDIX B

STATES WITH CONTRIBUTION LIMITS AT $1,000 PER ELECTION/$2,000 PER ELECTION CYCLE

STATE NAME	CONTRIBUTION LIMIT
Alaska: All Offices	$1,000[a]
Arkansas: All Offices	$1,000
California: All Offices	$1,000[g]
Connecticut: Sheriff Local Chief Executive	$1,000
Georgia: Statewide General Assembly Other Candidates	$1,000[d]
Hawaii: 2-Year Offices	$2,000[b]
Kansas: State Senate	$1,000
Louisiana: All Candidates except Major Office and District Office Candidates	$1,000

[a]Per Year
[g]Per Special Election or Special Runoff Election
[d]Non-Election Year
[b]Per Election Cycle

STATE NAME	CONTRIBUTION LIMIT
Maine:	
All Offices	$1,000
Michigan:	
State Senate	$1,000[b]
Minnesota:	
Gov./Lt. Governor	$2,000[e]
Attorney General	$1,000[e]
Missouri:	
Statewide Offices	$1,000
Nevada:	
State	$2,000[b]
City	
County	
Judicial	
New Hampshire:	
All Candidates (unless the candidate agrees to voluntarily limit expenditures)	$1,000
New York:	
Candidates other than Statewide Candidates, State Senator, Member of General Assembly, New York City Mayor, Public Advocate and Comptroller	$1,000
Oklahoma:	
Local Candidate	$1,000[f]
Rhode Island:	
All Candidates Except Publicly Funded Candidates	$1,000[f]

[b]Per Election Cycle
[e]Election Year
[f]Per Calendar Year

STATE NAME	CONTRIBUTION LIMIT
South Carolina: Per Non-Statewide Candidate	$1,000
South Dakota: Statewide Office	$1,000[f]
Tennessee: Non-State Office Candidate	$1,000
Vermont: All Offices	$1,000
Washington: State Executive Office	$1,000
West Virginia: Per Candidate	$1,000
Wisconsin: State Senator Circuit Judge	$1,000[f] 1,000 or $3,000[h]
Wyoming: Per Candidate	$1,000[i]

[f]Per Calendar Year
[h]Depending on Population of Circuit
[i]Per Primary, General or Special Election

APPENDIX C

STATES WITH CONTRIBUTION LIMITS SLIGHTLY OVER $1,000 PER ELECTION/$2,000 PER ELECTION CYCLE

STATE NAME	CONTRIBUTION LIMIT
Connecticut:	
Statewide Executive Offices (Excluding Governor)	$1,500
Delaware:	
Statewide Candidate	$1,200
New Jersey:	
Governor	$1,800
Non-Governor	$1,500

APPENDIX D

CONTRIBUTION LIMITS FOR OTHER STATES

STATE NAME	CONTRIBUTION LIMIT
Alabama:	
All Offices	Unlimited
Arizona:	
Total Contributions	$2,560[f]
Colorado:	
All Offices	Unlimited
Connecticut:	
Governor	$2,500
Georgia:	
Statewide Candidates	$5,000[e]
General Assembly	$2,000
Other Candidates	
Hawaii:	
4-Year Offices	$4,000[b]
Statewide Offices	$6,000[b]
Idaho:	
All Offices	Unlimited
Illinois:	
All Offices	Unlimited; but generally prohibited for judicial candidates and judicial employees

---

[f]Per Calendar Year
[e]Election Year
[b]Per Election Cycle

STATE NAME	CONTRIBUTION LIMIT
Indiana:	
All Offices	Unlimited
Iowa:	
All Offices	Unlimited
Kansas:	
Statewide Candidate	$2,000
Louisiana:	
Major Office Candidates	$5,000
District Office Candidates	$2,500
Maryland:	
Per Candidate	$4,000[b]
Per Four-Year Election Cycle	$10,000
Michigan:	
Statewide Office	$3,400[b]
Mississippi:	
All Offices	Unlimited
Nebraska:	
All Offices	Unlimited
Nevada:	
Statewide Office	$10,000[b]
New Hampshire:	
Per Candidate (if the candidate agrees to voluntarily limit expenditures)	$5,000
New Mexico:	
All Offices	Unlimited
North Carolina:	
All Candidates	$4,000

[b]Per Election Cycle

STATE NAME	CONTRIBUTION LIMIT
North Dakota: All Offices	Unlimited
Ohio: All Offices	Unlimited
Oklahoma: Candidate/Candidate Committee for State or Municipal Office in a Municipality of 250,000 or more	$5,000[f]
Pennsylvania: All Offices	Unlimited
Rhode Island: All Candidates	$10,000[f]
South Carolina: Statewide Candidate	$3,500
Tennessee: State Office Candidates	$2,500
Texas: All Offices	Unlimited
Utah: All Offices	Unlimited
Virginia: All Offices	Unlimited
Washington: For a Campaign For Other Than Statewide Offices	$5,000[j]

---

[f]Per Calendar Year
[j]Within 21 Days of General Election

STATE NAME–	CONTRIBUTION LIMIT
Wisconsin:	
Statewide Office	$10,000[f]
Court of Appeals Judge	$2,500 or $3,000[k]

[f]Per Calendar Year
[k]Depending on Population of District